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3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF CALIFORNIA
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6 THERESA L. BLANKENSHIP,
7 Plaintiff,

8 v.

9
10 ACCOUNT RECOVERY
11 SERVICE, INC.,
12 Defendant.
13

Case No.: 15-cv-2551-BTM-JLB

**ORDER DISMISSING WITHOUT
PREJUDICE DEFENDANT
ACCOUNT RECOVERY SERVICE,
INC., AND GRANTING LEAVE TO
AMEND COMPLAINT**

14 On January 5, 2017, Plaintiff filed a motion for default judgment against
15 defendant Account Recovery Service, Inc., in which she asserted, in part, that
16 Account Recovery Service, Inc. was in default in that it allegedly executed a waiver
17 of service of the summons and complaint pursuant to Federal Rule of Civil
18 Procedure 4(d)(1), but thereafter failed to file a responsive pleading.

19 On the Court's review of the waiver form referenced by Plaintiff, it determined
20 that the waiver stated the party waiving service as "Kathryn Nix,"¹ not Account
21 Recovery Service, Inc., and that it was executed in Oxnard, California, whereas
22 the complaint alleged that the primary corporate address of Account Recovery
23 Service, Inc. was in Milwaukee. The Court thus found the waiver form insufficient
24 to demonstrate the Court had acquired personal jurisdiction over Account
25 Recovery Service, Inc. (ECF No. 59.) The Court accordingly denied Plaintiff's
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28 ¹ The Court read the handwritten form as "Kathryn Dix," but Plaintiff now indicates the handwriting actually says
"Kathryn Nix."

1 motion for judgment by default, and issued an Order to Show Cause (“OSC”)
2 requiring Plaintiff to show good cause, in writing, why Account Recovery Service,
3 Inc. should not be dismissed from the action based on Plaintiff’s failure to effect
4 service, or obtain a valid waiver of service, within 90 days of filing the complaint,
5 as required by Federal Rule of Civil Procedure 4(m). (ECF No. 59.)

6 Plaintiff has filed a timely response to the OSC. In essence, she contends
7 that she served the correct person—Kathryn Nix, in Oxnard—but the wrong entity.
8 She states her claim under the Fair Credit Reporting Act, 15 U.S.C. § 1681 is
9 based on an allegedly wrongfully derogatory remark on her credit report entered
10 by “Account Recovery Service,” with a P.O. Box in Oxnard. Pl.’s Resp. to OSC,
11 Ex. 1. Her counsel’s research led him to conclude that “Account Recovery Service”
12 meant Account Recovery Service, Inc., a corporation the California Secretary of
13 State website identifies as a “forfeited” Wisconsin corporation with a principal
14 address in Milwaukee, whose agent for service of process is C T Corporation
15 System, located at 818 W. 7th Street in Los Angeles, California. Id. Ex. 2.
16 Plaintiff’s counsel states he nevertheless sent the waiver of service packet to
17 Kathryn Nix at a street address in Oxnard (“411 N A St in Oxnard, California”)
18 based on an online search that apparently led him to website with the Oxnard
19 mailing address. Id. at 2:17-23.

20 Plaintiff’s counsel states he has now done additional research and has
21 learned that the California Secretary of State website associates two corporations
22 with the 411 N A St, Oxnard address: TriCounties Adjustment Bureau, Inc., and
23 Accounts Adjustment Bureau. Id. Exs. 3, 4. Kathryn Nix is listed as the agent for
24 service of process of both entities. Id. Plaintiff’s counsel indicates the new
25 information has led him to conclude that TriCounties Adjustment Bureau, Inc.,
26 doing business as Account Recovery Service, is the correct defendant—not
27 Account Recovery Service, Inc., the Wisconsin corporation identified in the
28 complaint. Id. at 3:24-4:1. Plaintiff’s counsel asks the Court to allow Plaintiff to

1 amend her complaint to name Tri Counties Adjustment Bureau, Inc. Id. at 4:1-5.

2 Plaintiff's burden in response to the OSC was to demonstrate good cause
3 for the failure to effect service, or obtain a valid waiver of service, as to Account
4 Recovery Service, Inc. within 90 days of filing this action. See Fed. R. Civ. P. 4(m).
5 The "good cause" inquiry focuses on whether the Plaintiff has been diligent in
6 attempting to effect service, and whether "some outside factor ... rather than
7 inadvertence or negligence, prevented service...." Fed. R. Civ. P. 4, H.R. 7154—
8 Federal Rules of Civil Procedure Amendments Act of 1982 ("If the plaintiff has not
9 been diligent, the court will dismiss the complaint for failure to serve within 120
10 [now 90] days..."), Fed. R. Civ. P. 4, Adv. Comm. Notes to 1993 Am., Subdivision
11 (m) (stating relief for failure to effect service within required time frame may be
12 justified "if the defendant is evading service or conceals a defect in attempted
13 service"); Mann v. Castiel, 681 F.3d 368, 374 (D.C. Cir. 2012) (quoting Lepone-
14 Dempsey v. Carroll Cnty. Cm'rs, 476 F.3d 1277, 1281 (11th Cir. 2007)). "In making
15 extension decisions under Rule 4(m) a district court may consider factors like a
16 statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and
17 eventual service." Efaw v. Williams, 473 F.3d 1038, 1041 (9th Cir. 2007) (internal
18 quotation marks and citation omitted). If there is a showing of good cause, the
19 district court must grant an extension of time for service under Rule 4(m), and if
20 there is not, the court may dismiss the defendant without prejudice. Fed. R. Civ.
21 P. 4(m); Efaw, 473 F.3d at 1041.

22 The Court finds Plaintiff has not demonstrated good cause for the failure to
23 effect service, or obtain a valid waiver of service, as to Account Recovery Service,
24 Inc. At the outset, Plaintiff now disclaims the notion that Account Recovery
25 Service, Inc. is a proper defendant in this action, which effectively moots the issue.
26 To the extent Plaintiff's counsel attempts to justify his delay in discovering the
27 defect in service, the Court finds the response insufficient to provide such
28 justification. This action was filed on November 12, 2015. (ECF No. 1.) At the

1 time Plaintiff's counsel served the waiver form, he was operating under the belief
2 that Account Recovery Service, Inc., a Wisconsin corporation, was the correct
3 defendant. The California Secretary of State's internet database shows CT
4 Corporation is the agent for service of process for Account Recovery Service, Inc.
5 Plaintiff's counsel gives no indication this information was not available to him at
6 the time he was attempting to effect service. A waiver of service of process, when
7 served on a corporation, must be addressed "to an officer, a managing or general
8 agent, or any other agent ... authorized by law." Fed. R. Civ. P. 4(d)(1)(A)(ii). Yet
9 rather than serve the waiver package on CT Corporation, Plaintiff's counsel chose
10 to send the waiver package to Kathryn Nix at an address in Oxnard, on the basis
11 of an internet search (a search he now contends actually led him to a different
12 entity). This additional information merely confirms that the waiver form did not
13 create personal jurisdiction over Account Recovery Service, Inc., and fails to justify
14 the delay in discovery of the defect.

15 In reviewing Plaintiff's OSC response, the Court found it necessary to
16 consider whether it inadvertently acquired personal jurisdiction over Account
17 Recovery Service, Inc., by the apparent participation of its counsel, Lloyd Dix, in a
18 discovery conference early in the case. Plaintiff has submitted a copy of a
19 February 22, 2016 email addressed to "efile_Bartick@casd.uscourts.gov," the e-
20 file address for Magistrate Judge Bartick. Ex. 6. Attached to the email is a
21 "Proposed Joint Discovery Plan Pursuant to F.R.C.P. 26(f)" prepared by Plaintiff's
22 counsel, which includes electronic signatures of counsel, including Lloyd Dix ("/s/
23 Lloyd Douglas Dix") on behalf of Account Recovery Service, Inc. Ex. 6. The
24 proposed plan states that a Rule 26(f) meeting was held telephonically on January
25 27, 2016. Id. Although the proposed discovery plan was emailed to the magistrate
26 judge, the electronic docket for this case shows that the document was never filed.

27 Although Plaintiff does not contend Dix's participation in the discovery
28 conference and electronic signature to the proposed discovery plan resulted in a

1 general appearance on behalf of Account Recovery Service, Inc., the Court has
2 considered the issue sua sponte. “Defendants can waive the defect of lack of
3 personal jurisdiction by appearing generally without first challenging the defect in
4 a preliminary motion, or in a responsive pleading.” Jackson v. Hayakawa, 682
5 F.2d 1344, 1347 (9th Cir. 1982). “An appearance ordinarily is an overt act by which
6 the party comes into court and submits to the jurisdiction of the court..., an
7 affirmative act involving knowledge of the suit and an intention to appear.” Benny
8 v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986). However, “[n]ot every act by a party
9 that is addressed to the court or relates to the litigation will be deemed an
10 appearance.” Taylor v. Boston & Taunton Transp. Co., 720 F.2d 731, 733 (1st
11 Cir. 1983) (quoting 10 Wright, Miller & Kane Federal Practice & Procedure § 2686
12 (2d ed. 1983). “Informing the clerk of a change in address, Anderson v. Taylorcraft,
13 Inc., 197 F. Supp. 872 (W.D. Pa. 1961), and requesting a delay in the entry of a
14 default judgment, Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d
15 655 (7th Cir. 1956), have been held insufficient to constitute an appearance.” Id.;
16 see Benny, 799 F.2d at 493 (holding defendant prison guards’ three motions to
17 extend time to respond to the complaint did not result in a general appearance).

18 The Court finds Dix’s participation in the telephonic discovery conference
19 and signing of the proposed discovery plan did not result in a general appearance.
20 Although the proposed discovery plan was emailed to the magistrate judge, it was
21 never filed. S.D. Cal. Elect. Case Filing Admin. Policies & P., R. 2(a),
22 [https://www.casd.uscourts.gov/CMECF/Lists/Policies%20and%20Procedures/Att](https://www.casd.uscourts.gov/CMECF/Lists/Policies%20and%20Procedures/Attachments/8/CASDPolicies_01-20-2017.pdf)
23 [achments/8/CASDPolicies_01-20-2017.pdf](https://www.casd.uscourts.gov/CMECF/Lists/Policies%20and%20Procedures/Attachments/8/CASDPolicies_01-20-2017.pdf) (“[e]-mailing a document to ... the
24 assigned judge does not constitute ‘filing’ of the document”). Emailing the
25 proposed discovery plan to the magistrate judge was thus akin to the contacts
26 between counsel and courts that have been held not to result in a general
27 appearance. Anderson, 197 F. Supp. at 874 (letter to the clerk regarding change
28 in address); Taylor, 720 F.2d at 733 (holding there was no general appearance

1 where a docket entry indicated counsel contacted the court to state he would be
2 filing an answer and motion to set aside default in two weeks); compare Vuitton v.
3 Rags on Wheels, Civ. S-91-1294 EJG GGH 1992 U.S. Dist. LEXIS 20803, *3-4
4 (E.D. Cal. 1992) (finding counsel made a general appearance where he signed a
5 stipulation “that was later filed”).

6 Also, Dix’s participation in the discovery conference and approval of the
7 proposed discovery plan is consistent with an intent to preserve his client’s rights
8 while investigating whether his client had been served (and it is now apparent that
9 there was no service on Account Recovery Service, Inc.). “[A]n appearance is
10 always a matter of intention, and is not to be inferred....” Anderson, 197 F. Supp.
11 at 874 (citation omitted). In Ayres v. Jacobs & Crumplier P.A., 99 F.3d 565, 568
12 (3d Cir. 1996), defendants filed motions to dismiss challenging validity of service
13 of process, and subsequently participated in discovery and attended scheduling
14 conferences. Id. The Third Circuit held counsel’s conduct was merely “prudent” in
15 light of their client’s potential liability and did not result in waiver of objections to
16 personal jurisdiction. Id. Likewise, Dix’s participation in the discovery conference
17 early in this case and shortly after the alleged service, combined with the lack of
18 any subsequent responsive pleading, is at least consistent with the intent to
19 preserve his client’s discovery rights while confirming whether Account Recovery
20 Service, Inc. had been served. The Court therefore concludes no general
21 appearance resulted, and it did not acquire personal jurisdiction over Account
22 Recovery Service, Inc.

23 Because Account Recovery Service, Inc. has not been served, far more than
24 90 days have elapsed since the action was filed on November 12, 2015, and
25 Plaintiff has not shown good cause for the delay, the Court will dismiss Account
26 Recovery Service, Inc. from the action pursuant to Rule 4(m).

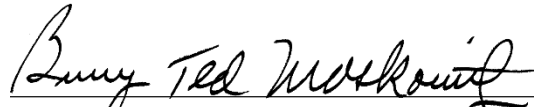
27 Plaintiff’s counsel indicates he now believes the complaint erroneously
28 named Account Recovery Service, Inc., a Wisconsin corporation, and that the

1 correct defendant is actually Tri Counties Adjustment Bureau, Inc., doing business
2 as Account Recovery Service. OSC Resp. at 3:24-36. The Court will grant Plaintiff
3 the opportunity to amend the complaint to add the proposed new defendant. If
4 Plaintiff does amend, the newly named defendant must thereafter be served with
5 process (or waive service) in accordance with Rule 4 as with any new defendant.

6 For the foregoing reasons, defendant Account Recovery Service, Inc. is
7 DISMISSED WITHOUT PREJUDICE from this action. The Court grants Plaintiff
8 leave to amend the complaint to name the proposed new defendant identified in
9 the response to the OSC. Plaintiff shall file the amended complaint by May 15,
10 2017.

11 IT IS SO ORDERED:

12 Dated: May 2, 2017

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14 Barry Ted Moskowitz, Chief Judge
15 United States District Court
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